

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF KENTUCKY POWER	)	
COMPANY FOR: (1) THE APPROVAL OF	)	
THE TERMS AND CONDITIONS OF THE	)	CASE NO. 2015-00190
SIXTH AMENDMENT TO THE RENEWABLE	)	
ENERGY PURCHASE AGREEMENT FOR	)	
BIOMASS ENERGY RESOURCES BETWEEN	)	
THE COMPANY AND ECOPOWER	)	
GENERATION-HAZARD, LLC; (2)	)	
AUTHORIZATION TO ENTER INTO THE	)	
SIXTH AMENDMENT TO THE AGREEMENT;	)	
(3) THE GRANT OF CERTAIN	)	
DECLARATORY RELIEF; AND (4) THE	)	
GRANT OF ALL OTHER REQUIRED	)	
APPROVALS AND RELIEF	)	

ORDER

This matter is before the Commission on Kentucky Power Company's ("Kentucky Power") June 22, 2015 application requesting, among other things, authorization to enter into, and Commission approval of, a sixth amendment to the Renewable Energy Purchase Agreement ("REPA") for biomass energy resources between Kentucky Power and ecoPower Generation-Hazard, LLC ("ecoPower"). By Order entered October 10, 2013, in Case No. 2013-00144, the Commission approved the REPA between Kentucky Power and ecoPower.<sup>1</sup> In that case, the Commission granted full intervention to the Attorney General of the Commonwealth of Kentucky, by and through his Office of Rate

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<sup>1</sup> Case No. 2013-00144, *Application of Kentucky Power Company for Approval of the Terms and Conditions of the Renewable Energy Purchase Agreement for Biomass Energy Resources between the Company and Ecopower Generation-Hazard LLC* (Ky. PSC Oct. 10, 2013).

Intervention (“AG”) and Kentucky Industrial Utility Customers, Inc. (“KIUC”). The Commission ultimately found, based on the significant evidence in the record, that Kentucky Power had sufficiently established that there was a need for the REPA and that the REPA was fair, just and reasonable, as required under KRS 278.271.

KIUC appealed the Commission’s October 10, 2013 Order to the Franklin Circuit Court and named as defendants the Commission, the AG, and Kentucky Power. The Commission defended its Order, and on February 18, 2015, the Franklin Circuit Court entered an Opinion and Order affirming the Commission’s approval of the REPA. On March 13, 2015, KIUC filed a Notice of Appeal to the Kentucky Court of Appeals seeking reversal of the Franklin Circuit Court’s Opinion and Order. KIUC named the Commission as one of the appellees in that appeal, which has been assigned Case No. 2015-CA-00398 and is pending before the Court of Appeals.

Kentucky Power now applies to the Commission seeking: 1) approval of the terms and conditions of the sixth amendment to the REPA; (2) authorization to enter into the sixth amendment; and (3) the grant of all other required approvals and relief. Kentucky Power also seeks a declaratory order that none of the second through seventh amendments to the REPA have altered or changed the Commission’s October 10, 2013 Order in Case No. 2013-00144 granting approval of the REPA and authorizing recovery of its cost through a monthly rate surcharge. KIUC has filed a motion to intervene, which the Commission has granted, as well as a motion to establish a procedural schedule. On July 8, 2015, KIUC filed a response to Kentucky Power’s request for a declaratory order, objecting to the proposed sixth amendment to the REPA and arguing that, if approved, the sixth amendment would make at least two significant

changes to the terms of the REPA that would adversely impact Kentucky Power's customers.

However, as a threshold matter, it appears that the Commission may lack jurisdiction to review Kentucky Power's application, since the REPA's validity is currently being challenged on appeal in Case No. 2015-CA-000398. Generally, the filing of a notice of appeal divests a tribunal of jurisdiction to rule on matters involved in the appeal while the appeal is pending, and transfers the named parties to the jurisdiction of the appellate court.<sup>2</sup> The Commission has previously held that an administrative appeal of its decision transfers jurisdiction of the case to the appellate court.<sup>3</sup>

Accordingly, the Commission finds that each party should have ten days to submit a legal memorandum on the issue of whether the pending appeal of our October 10, 2013 Order approving the REPA divests us, until such time as the appeal is concluded, from considering Kentucky Power's proposed amendments to the REPA and from issuing a declaratory order that those amendments have not changed the approvals set forth in that October 10, 2013 Order.

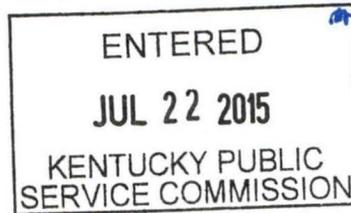
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<sup>2</sup> See *Johnson v. Commonwealth*, 17 S.W.3d 109, 113 (Ky. 2000); *City of Devondale v. Stallings*, 795 S.W.2d 954, 957 (Ky. 1990); *Young v. Richardson*, 267 S.W.3d 690, 695-96 (Ky. App. 2008).

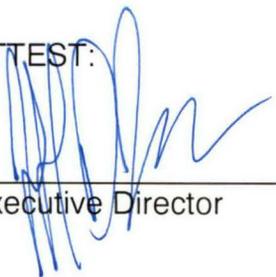
<sup>3</sup> See Case No. 2004-00403, *The Union Light, Heat and Power Company's Motion for an Extension of Filing Date and Continuation of Its Current Rider AMRP Rates* (Ky. PSC Jan. 27, 2005) (The Commission declined to rule on a motion to modify a previously entered Commission Order on grounds that the Commission lacked jurisdiction to modify an Order that had been entered over two years earlier and was still pending on appeal at the Franklin Circuit Court.); Case No. 1995-00445, *An Examination by the Public Service Commission of the Environmental Surcharge Mechanism of Kentucky Utilities Company as Billed from February 1, 1995 to July 31, 1995* (Ky. PSC Mar. 6, 1996) (The Commission denied KIUC's request to require refunds on the basis that the case was pending appellate review.); and Case No. 2007-00134, *The Application of Kentucky-American Water Company for a Certificate of Convenience and Necessity Authorizing the Construction of Kentucky River Station II, Associated Facilities and Transmission Main* (Ky. PSC June 5, 2008) (The Commission lacked jurisdiction to reopen the case or otherwise modify its Order while the case was pending review by the Franklin Circuit Court).

IT IS THEREFORE ORDERED that within ten days of the date of this Order, each party shall submit a legal memorandum on the issue of the impact, if any, of the pending appeal of our October 10, 2013 Order on the Commission's jurisdiction to review the proposed amendments to the REPA and to issue a declaratory order as requested by Kentucky Power.

By the Commission



ATTEST:

  
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